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No. 01-

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IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILWAY CO.,
Petitioner,

v.

TAMERA LEE KAPITAN, Special Administratrix
of the Estate of RUDOLPH J. KAPITAN,
Respondent.

On Petition for a Writ of Certiorari to the Indiana Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), require summary reversal of a state court holding that state inadequate-device tort law claims are not pre-empted under the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106, despite the presence of installed federally funded warning devices at the railway crossing at the time of the accident?

2. Whether the state court erred in holding, in conflict with the United States Court of Appeals for the Tenth Circuit, that pre-emption is inappropriate when certain additional federally funded warning devices were not fully installed and operating at the time of the accident?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Richard Enos, the train conductor, was a defendant but not an appellant below.[1]

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it is a wholly owned subsidiary of the Canadian National Railway. Petitioner further states that no publicly traded company owns ten percent or more of the stock of Canadian National Railway.

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[1] The trial court entered judgment for Defendant Richard Enos on February 2, 2000.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Grand Trunk Western Railway Company ("Grand Trunk") respectfully petitions for a writ of certiorari to review the judgment of the Indiana Court of Appeals in this case.

OPINIONS BELOW

The judgment of the Indiana Court of Appeals was entered on April 6, 2001, and is not reported. Pet. App. 3a-17a. The order denying the petition for rehearing was entered on June 6, 2001, and is not reported. The order of the Indiana Supreme Court denying the petition for transfer was entered on November 14, 2001, and is not reported. Pet. App. 1a-2a. The order of the Circuit Court granting in part and denying in part petitioner's motion for summary judgment was entered on July 13, 1995, and is not reported. Pet. App. 22a-30a. The order of the Indiana Court of Appeals on an interlocutory appeal reversing the trial court's grant of partial summary judgment was entered on April 11, 1997, and is not reported. Pet. App. 18a-21a.

JURISDICTION

The opinion of the Indiana Court of Appeals was entered on April 6, 2001. The Indiana Supreme Court denied Grand Trunk's petition for transfer on November 14, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutes at issue in this case are 23 U.S.C. §§ 109(e), 130, and 409 and 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434) and are reprinted in Pet. App. 31a-37a. The

regulations at issue in this case are 23 C.F.R. §§ 646.214 and 646.216; they are reprinted in Pet. App. 38a-46a.[1]

STATEMENT OF THE CASE

In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), this Court elucidated the standards for federal pre-emption of state tort law claims alleging that a railroad failed to install adequate warning devices at highway-railroad crossings. This Court held that pre-emption is mandated by the Federal Railroad Safety Act of 1970 ("FRSA") for any project where federal-aid funds participate in the installation of warning devices. *Easterwood*, 507 U.S. at 670; *Shanklin*, 529 U.S. at 352-54; 23 C.F.R. § 646.214(b)(3) & (4).

In this case the Indiana Court of Appeals allowed a state negligence claim despite the installation of certain federally funded devices at a highway-railroad crossing. This holding is in direct conflict with *Easterwood* and *Shanklin* and requires summary reversal. The Indiana Court of Appeals denied pre-emption because certain additional federally funded warning devices were not yet fully installed and operating at the time of the accident, Pet. App. 9a-10a, but under *Shanklin*'s holding, that fact is immaterial to pre-emption analysis. For any crossing with federally funded devices, federal law dictates the standards for determining what devices are adequate, and displaces any independent duty of care that the railroad may have had under state law. *Shanklin*, 529 U.S. at 353.

Even if summary reversal were not appropriate, this Court should resolve the substantial conflict in the circuits over what constitutes the "installation" of federally funded

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[1] The regulations are reproduced from the 2001 edition of the Code of Federal Regulations. The regulations have not changed substantively since the time of the accident.

warning devices that triggers FRSA pre-emption. The Indiana Court of Appeals, in delaying pre-emption until the end of the project, joined several federal courts of appeals in a conflict with the United States Court of Appeals for the Tenth Circuit, which has determined that pre-emption is triggered at the beginning of a project, when the decisionmaking authority of the railroad ends. The resulting patchwork of standards for federally funded railroad crossings undermines the "[n]ational uniformity" sought by Congress in enacting the FRSA, see 49 U.S.C. § 20106. This Court should grant certiorari in order to resolve the conflict and to promote the statutory goal of uniformity in the area of railroad safety.

A. Statutory And Regulatory Background

The safety of public railway-highway grade crossings has long been a matter of federal concern.[2] From the inception of the federal-aid highway program, Act of July 11, 1916, ch. 241, 39 Stat. 355, Congress authorized federal funds for States to use in improving those crossings. From as early as 1936, see Act of June 16, 1936, ch. 582, § 8, 49 Stat. 1519, 1521, Congress has forbidden expenditure of federal funds on any portion of federal-aid or other designated highways "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing." 23 U.S.C. § 109(e).[3]

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[2] A "public grade crossing" is an intersection of a railway and a public road at the same level. Federal R.R. & Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Solving the Problem* 2 (1972) ("*1972 Crossings Report*").

[3] Such provisions served not only to protect motor vehicle drivers and passengers, but also the railroads and their passengers: "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation.' *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 422-23 (1935) (footnote omitted) (discussing grade crossings); *see also Prevention of Rail-Highway Grade-Crossing*

In 1970, Congress, troubled by the inadequacy of haphazard state regulation of railroad safety,[4] enacted the FRSA, Pub. L. No. 91-458, 84 Stat. 971.[5] The purpose of the FRSA was "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress vested the Secretary of Transportation with broad powers to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a); *Shanklin*, 529 U.S. at 347. In the FRSA's pre-emption provision, Congress unequivocally declared its intent that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Accordingly, it only permitted States to "adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.*; *Shanklin*, 529 U.S. at 347-48.

Accidents Involving Ry. Trains & Motor Vehicles, 322 I.C.C. 1, 82 (1964) ("In the past it was the railroad's responsibility for protection of the public at grade crossings. . . . Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.").

[4] *See* H.R. Rep. No. 91-1194, at 11 (1970) (expressing disbelief that "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

[5] The FRSA was originally codified at 45 U.S.C. §§ 421 to 447. As part of a broad reorganization of federal transportation laws, Congress formally repealed the FRSA in 1994 and re-enacted its substantive provisions for codification in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Congress made clear that the repeal and re-enactment were not intended to make any substantive change in the FRSA provisions, other than minor alterations in form or language. *See id.* § 6(a), 108 Stat. at 1378; H.R. Rep. No. 103-180, at 1-5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-22.

In 1972, the Secretary of Transportation submitted a statutorily-mandated study of the grade crossing program.[6] He reported that "the current division of responsibility and authority among the private and public interests involved at the State and local level result[ed] in a fragmented approach to grade crossing safety," and he called for new "national coordination of [the] issue." *1972 Crossings Report* at 34. The Secretary recommended that Congress focus its funding efforts on installing protective devices rather than eliminating grade crossings altogether. *Id.* at 91. Although active warning systems, which are expensive, were not warranted at most crossings,[7] the Secretary underscored the universal importance of passive warnings by recommending that "each railroad and each public agency which does not now have a program for passive device improvement should undertake one immediately." *Id.* at 92. Observing that crossing dangers were not limited to the traditional federal-aid highway system, the Secretary called for expansion of federal funding to all public roads in a State. *Id.* at iii, 14, 92. Finally, the Secretary recommended that the Federal Highway Administration ("FHWA") administer assistance at the federal level, but that the "State highway departments, in cooperation with political subdivisions," have primary

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[6] Section 433 of FRSA, in addition to requiring the Secretary to undertake solutions to the grade crossing problem pursuant to his authority under existing law, mandated that the Secretary submit to the President for transmittal to Congress a comprehensive study of the grade crossing program, together with his recommendations for eliminating and protecting railroad crossings. 45 U.S.C. § 433 (repealed 1994).

[7] "Active warning devices" include automatic gates and flashing lights that are activated by the approach of a train. "Passive warning devices" are devices such as signs and pavement markings that do not change when a train approaches. 23 C.F.R. § 646.204. The costs of active devices at each crossing were reported to range (in 1972 dollars) from $17,000 to $30,000 for installation, and $800 to $1,400 for annual maintenance. *1972 Crossings Report* at 77.

responsibility for developing programs for crossing safety. *Id.* at 92.

In response to the Secretary's report, Congress enacted section 203 of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, 283.[8] This statute specifically grants States federal funds "for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a). To secure funds, States must "conduct and systematically maintain a survey of all highways" to identify crossings in need of safety improvements, and must "establish and implement a schedule of projects for this purpose." *Id.* § 130(d). The regulatory scheme is known as the Section 130 Crossing Program.

This federal approach to crossing hazards has been a resounding success. Even though highway and rail traffic has increased, the Section 130 program has contributed to a precipitous decline in the number of crossing accidents and fatalities: there were more than 12,000 accidents and 1,500 fatalities at railway crossings in 1972, and only about 3,502 accidents and 425 fatalities in 2000. U.S. Dep't of Transp., *Accidents That Shouldn't Happen: A Report of the Grade Crossing Safety Task Force to Secretary Federico Pena* 2 (1996); Federal R.R. Admin., U.S. Dep't of Transp., *Railroad Safety Statistics Annual Report 2000*, at 4 tbl.1-1 (2001).

The Section 130 program was implemented through regulations promulgated by the FHWA.[9] These regulations govern state programs for evaluating railway crossing hazards and developing remedial projects. See 23 C.F.R. pt. 924. The FHWA also made States "subject to further regulations

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[8] Congress repealed section 203 of the 1973 Highway Safety Act and re-enacted its provisions (with minor substantive changes not relevant here) as amendments to 23 U.S.C. § 130 in section 121 of the Surface Transportation Act of 1987, Pub. L. No. 100-17, § 121, 101 Stat. 132, 159-60.

[9] The Secretary delegated his statutory power to administer the Acts to the FHWA. *See* 49 C.F.R. § 1.48(b), (c)(2).

governing the use of particular warning devices." *Easterwood*, 507 U.S. at 666. Among those specific regulations is a rule prescribing what will constitute "[a]dequate warning devices" where "[f]ederal-aid funds participate in the installation of the devices" at rail-highway crossings. 23 C.F.R. § 646.214(b)(3). Specifically, 23 C.F.R. § 646.214(b)(3) lists the hazard conditions that require the installation of automatic gates and flashers. For those crossings that do not reflect the hazards listed in (b)(3), the type of warning device to be installed is "subject to the approval of FHWA." *Id.* § 646.214(b)(4). These regulations are at the heart of this case.

B. This Court's Decisions In *CSX Transportation, Inc.* v. *Easterwood* And *Norfolk Southern Railway* v. *Shanklin*

In *CSX Transportation, Inc.* v. *Easterwood*, this Court declared that the federal regulations defining "[a]dequate warning devices" in 23 C.F.R. § 646.214(b)(3) and (4) "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." 507 U.S. at 670.

This Court accordingly stated a bright-line test for federal pre-emption:

> In short, *for projects in which federal funds participate in the installation of warning devices*, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The . . . regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Id. at 671 (emphasis added). Simply stated, "when [§ 646.214(b)(3) and (4)] are applicable, state tort law is pre-empted." *Id.* at 670. The *Easterwood* Court found no pre-

emption in that case because the regulations did not apply. No federal funds had "participated" in the installation of warning devices since the plan for upgrading a crossing was "shelved and the funds allocated for use in another project." *Id.* at 672.

The lower courts nevertheless could not agree on how to apply the *Easterwood* bright-line rule, so this Court clarified the rule in *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000). In *Shanklin*, federal funds had participated in the installation of passive warning devices, but the lower court had determined that the plaintiff's inadequate warning device claim was not pre-empted by sections 646.214(b)(3) and (4). It declined to read *Easterwood* "literally" and decided that in the case of passive devices, there would be no pre-emption unless the FRSA made an individualized determination of the adequacy of the devices at the crossing. *Shanklin* v. *Norfolk S. Ry.* 173 F.3d 386, 392, 394, 397 (6th Cir. 1999). This Court reversed, concluding that pre-emption of relevant state tort law claims is not limited to active devices or dependent on individualized federal findings. Instead, pre-emption occurs, as *Easterwood* held, when federal funds have participated in the installation of *any* warning devices. *Shanklin*, 529 U.S. at 353.

This Court also rejected the claim that the State's failure to install a warning device required by the federal regulations precluded pre-emption. The respondent had argued that conditions at the crossing necessitated automatic gates and lights under 23 C.F.R. § 646.214(b)(3), and pavement markings were also required under subsection (b)(1). The Court found these arguments to be irrelevant to the pre-emption analysis, since it is the "displacement of state law concerning the devices' adequacy . . . that pre-empts state tort actions." *Shanklin*, 529 U.S. at 357-58.

Shanklin was careful to point out that once pre-emption attaches, it is not to be turned off and on like a water faucet, depending on future events: "[w]hether the State should have

originally installed different or additional devices, or whether conditions at the crossing have since changed such that automatic gates and flashing lights would be appropriate, is immaterial to the pre-emption question." *Id.* at 358.

C. Statement Of Facts

On November 6, 1988, a Grand Trunk train was traveling west as it approached a crossing at Hendricks Street in Merrillville, Indiana. Richard Kapitan was driving a car towards the railroad tracks at the same time. He was speeding and ran a stop sign at the tracks; the train and the car collided, and Kapitan died as a result of the collision.

On the date of the accident, the crossing was equipped with two 30-inch "Stop" signs (one for each side), two "Stop Ahead" signs, two "Railroad Crossing" ("crossbucks") signs with "2 Tracks" warnings, and railroad crossing markings on the pavement. These signs were installed as part of an FHWA-approved and -funded upgrade program for the grade crossing. The FHWA had approved the project on August 1, 1988, and committed federal funds to pay for the upgrade, which was also scheduled to include automatic gates and flashers that were not up at the time of the accident.

The crossing had been closed for the beginning of construction on October 3, 1988. The state highway contractor regraded the approach to eliminate a "humped" configuration, repaved the roadway, and installed the pavement markings. Merrillville's street department installed two new "Stop Ahead" signs, two "2 Tracks" signs, two "Stop" signs, and reinstalled the crossbucks. Grand Trunk poured foundations for gates and flashers. The crossing was reopened by Merrillville in early November, just days before the accident in this case. On December 1, 1988, after the accident, the gates and flashers were installed.

D. This Litigation

Kapitan's estate filed suit against the Grand Trunk Western Railway Company and its train conductor on December 2, 1989. The suit alleged various tort claims, including a claim that Grand Trunk was negligent in failing to install adequate warning devices at the Hendricks Street crossing.

Defendants denied any negligence in their answer, and on November 28, 1994, they moved for partial summary judgment on the claim of insufficient warning devices, arguing that the claim was pre-empted by federal law. On July 13, 1995, the trial court agreed and granted partial summary judgment, finding that the claim was a "state law claim . . . preempted by federal law, and therefore said claim must fail." Pet. App. 29a.

Plaintiff sought an interlocutory appeal, arguing that the partial summary judgment eliminated her ability to prevail at trial and recover damages in the case. On April 11, 1997, the Indiana Court of Appeals reversed the trial court's decision on pre-emption. It wrote that "[b]ecause the federally approved warning devices were not yet operational at the time of Kapitan's accident, preemption had not occurred as of the accident, and summary judgment must be reversed on this issue." Pet. App. 20a.

A jury trial was scheduled for January 31, 2000. The trial court rejected Grand Trunk's motion for a continuance pending this Court's decision in *Shanklin*. On February 3, 2000, the jury returned a verdict finding Kapitan 60 percent at fault, but nonetheless awarding his estate damages. Because the jury had been instructed that no damages could be awarded if Kapitan was more than 50 percent at fault, the trial court returned the case to the jury to rectify the verdict. The jury returned an amended verdict that Kapitan was 50 percent at fault, and awarded Kapitan's estate $2,554,740.00 in damages. Grand Trunk appealed to the Indiana Court of Appeals.

E. Decision Of The Indiana Court Of Appeals

A central issue before the Indiana Court of Appeals was the federal pre-emption of the inadequate warning device claim. The trial court had *found as an uncontested fact that federal funds had participated in the installation of the stop signs and pavement markings at the Hendricks Street crossing*. C.A. App. 214-15 ("On August 1, 1988, the Federal Highway Administration approved the Hendricks Street crossing upgrade project, obligating federal funds to pay for the project.") Despite this undisputed evidence, as well as this Court's intervening decision in *Shanklin*, the Indiana Court of Appeals affirmed the jury's verdict on April 6, 2001. The court rejected Grand Trunk's federal pre-emption claim by quoting its earlier interlocutory decision:

> In our previous unpublished decision of *Kapitan v. Grand Trunk Western Railway Co.*, No. 37C01-9004-CT-88, slip op. at 3 (Ind. Ct. App. 1997) we held that "[b]ecause the federally approved warning devices were *not yet operational* at the time of Kapitan's accident, preemption had not occurred as of the accident, and summary judgment must be reversed on this issue." (Emphasis added.) This language is consistent with the Supreme Court's opinion in *Shanklin*. Accordingly, we affirm our previous ruling that Kapitan's state tort claim was not preempted by federal regulations.

Pet. App. 9a-10a. The court simply ignored the fact that there were federally funded (and fully installed) warning devices at the crossing at the time of the accident.

Grand Trunk filed a timely petition for rehearing on the ground that the Indiana Court of Appeals' pre-emption analysis conflicted with this Court's decision *Shanklin*. On June 6, 2001, the Indiana Court of Appeals denied the petition without comment. Grand Trunk then filed a timely petition for transfer to the Indiana Supreme Court, which rejected the petition without comment on November 14, 2001.

REASONS FOR GRANTING THE PETITION

This case involves a state court's blatant disregard for a recent decision of this Court on an important issue of federal law. *Shanklin* established that when a crossing upgrade project receives federal approval and funding, and federally funded warning devices have been installed, any independent state-law duty of care a railroad may have had regarding the warning devices is pre-empted. In this case, the Indiana Court of Appeals allowed a state-law claim for negligence after federally funded passive warning devices had been installed. This Court should grant summary reversal in light of *Shanklin*.

In the alternative, if this Court declines to summarily reverse the decision below, it should grant certiorari in this case to resolve a mature circuit split on the question of what constitutes "installation" for the purpose of pre-emption timing where an accident occurs during an ongoing federally funded project for the installation of active devices. The decision of the Indiana Court of Appeals follows several federal courts of appeals in a direct conflict with the Court of Appeals for the Tenth Circuit, which holds that pre-emption occurs at the beginning of the project, when federal funds are committed to the installation of warning devices.

The consequences of this split are significant. It makes the responsibilities of the railroad and the federal and state governments vary depending on the jurisdiction where an accident occurs and thus undermines Congress's express goal of promoting the standardization of railroad safety regulations. See 49 U.S.C. § 20106. The generally strong interest in upholding both congressional intent and the supremacy of federal law coincides with the policy interest in ensuring that the law covering the safety of federally funded grade crossings be uniform. This Court should grant certiorari in order to correct the misapplication of its

Easterwood and *Shanklin* precedents and to resolve the conflict among the circuits.

I. THE DECISION OF THE INDIANA COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *EASTERWOOD* AND *SHANKLIN*.

The FRSA established that States may only regulate railroad safety until there is a federal law or regulation that "cover[s] the subject matter of the State requirement." 49 U.S.C. § 20106. At that point, state law is pre-empted. This displacement follows from the principle of the Supremacy Clause of the United States Constitution, providing that the Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2.

The FHWA promulgated federal regulations determining the appropriate warning measures at grade crossings when federal funds are used for a crossing upgrade. These federal regulations, 23 C.F.R. § 646.214(b)(3) and (4), which govern the choice of warning devices, "cover" the same subject matter as state negligence law on the adequacy of grade crossing warning devices. *Easterwood*, 507 U.S. at 671. This Court therefore held that when these regulations apply, state-law negligence claims against the railroad based on inadequate warning devices fail. *Id.* at 670; *Shanklin*, 529 U.S. at 357.

Specifically, *Shanklin* reasserted the lesson from *Easterwood* that "§§ 646.214(b)(3) and (4) pre-empt state tort claims concerning the adequacy of *all* warning devices installed with the participation of federal funds." *Shanklin*, 529 U.S. at 357. As this Court explained:

> When the FHWA approves a crossing improvement project and the State installs the warning devices using

> federal funds, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject. At that point, the regulation dictates "the devices to be installed and the means by which railroads are to participate in their selection."

Id. (quoting *Easterwood*, 507 U.S. at 671). As a consequence, "[w]hat states cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." *Id.* at 358.

In this case, the regulations applied, and passive warning devices were installed; plaintiff's state-law claim based on the warning devices therefore fails. The reason plaintiff no longer has a claim under state law is simple: plaintiff's claim rests on the assertion that *at the time of the accident*, the railroad owed the public a duty of care to provide adequate warning of the presence of a crossing by using various state warning devices. At the time of the accident, however, federal law had stepped in to determine what devices were necessary and to fund such devices. Once the State had accepted the federally funded passive warning devices, it could no longer impose an ongoing duty upon the railroad to determine the appropriate devices. Plaintiff cannot make a claim against the railroad for the breach of a duty of care when the railroad's state-law duty had been extinguished.

It is immaterial to the pre-emption analysis whether the federal project also calls for additional warning devices. *Shanklin* considered and rejected a similar claim: Plaintiff Shanklin argued that pre-emption did not apply in her case because at the time of the accident, pavement markings that were required by federal regulation (and thus were a mandatory requirement of the FHWA-approved project) did not exist. See 23 C.F.R. § 646.214(b)(1) (incorporating requirements of the U.S. Department of Transportation's *Manual on Uniform Traffic Control Devices for Streets and*

Highways ("MUTCD")); *id.* § 630.106(a) (requiring that a federal-aid project comply with all applicable regulations and laws). Plaintiff also argued that flashers and gates were necessary under section 646.214(b)(3) because there were extrahazardous factors present at the site.[10] *Shanklin*, 529 U.S. at 357. The *Shanklin* Court rejected these arguments as "misconce[ptions] [of] how pre-emption operates": it is the shift in decisionmaking authority that is the key to the pre-emption question. When the federal regulations apply, "[i]t is this displacement of state law concerning the devices' adequacy, and not the State's or the FHWA's adherence to the standard set out in §§ 646.214(b)(3) and (4) or to the requirements of the MUTCD, that pre-empts state tort actions." *Id.* at 357-58.[11]

Thus, even if the court below were correct that federally funded devices must be installed and operating for pre-emption to occur, but see *infra*, its judgment must be reversed. In the instant case, passive warning devices were installed with federal funds and were operational, as in *Shanklin*. The same regulations that triggered pre-emption in *Shanklin* apply in this case. The *Shanklin* Court rejected the same kind of argument plaintiff here makes about the absence

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[10] *Easterwood* noted that 23 C.F.R. § 646.214(b)(1) does not have a pre-emptive effect, although (b)(3) does where it applies. 507 U.S. at 669-70.

[11] The same logic underlies court decisions holding that later federal determinations requiring more warning devices at a crossing do not cancel the federal pre-emption that arose during an earlier federally funded passive device installation. *See Bock* v. *St. Louis Southwestern Ry.*, 181 F.3d 920 (8th Cir. 1999) (finding pre-emption when federal funds had been used to install crossbucks, even though at the time of the accident there had been no implementation of a later federal determination that the site should have lights and automatic gates), *cert. denied*, 529 U.S. 1086 (2000); *Powers* v. *CSX Transp., Inc.*, 97 F. Supp. 2d 1297 (S.D. Ala. 2000) (same). These holdings are in conflict with the instant case in that *Bock* and *Powers* do not require all federally mandated warning devices to be in place and operating in order for pre-emption to occur.

of some required devices, and it recognized that pre-emption had occurred. The Indiana Court of Appeals' decision was not faithful to this Court's teaching. Instead the court of appeals squarely held that a federally funded warning device installation that required pre-emption in *Shanklin* did not effect pre-emption in this case. This Court should grant certiorari to summarily reverse in light of *Shanklin*.

II. THE DECISION OF THE INDIANA COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE TENTH CIRCUIT AND THUS UNDERMINES THE FEDERAL POLICY OF UNIFORMITY IN RAILROAD SAFETY.

The lower court's holding that pre-emption is not triggered until the last of the mandated warning devices is functioning directly conflicts with the law in the Tenth Circuit, which locates the pre-emption trigger earlier in the process, when significant federal resources are committed. See *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996); *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559 (10th Cir. 1995). The key for the Tenth Circuit in determining when federal funds "participate in the installation" is "'the actual expenditure of federal resources of more than a casual or de minimis nature, and specifically directed toward the ultimate installation of the improved warning devices.'" *Armijo*, 87 F.3d at 1190 (quoting *Hatfield*, 64 F.3d at 562). That is the moment when the federal government commences "installation" of the warning devices and the crossing is federalized. Pre-emption therefore occurs at the beginning rather than the end of a crossing upgrade project. See *id.*; *Hatfield*, 64 F.3d at 562.

In contrast, the Indiana Court of Appeals and several federal courts of appeals, along with a state supreme court, have avoided federally mandated pre-emption until the last of the mandated warning devices has been installed. See *Thiele* v. *Norfolk & W. Ry.*, 68 F.3d 179 (7th Cir. 1995) (rejecting the argument that pre-emption occurred when the railroad had

dug holes and set posts for gates and flashers, which were not operational at the time of the accident; existing stop signs and crossbucks were not federally funded); *Waymire* v. *Norfolk & W. Ry.*, 218 F.3d 773, 776-77 (7th Cir. 2000) (reiterating *Thiele*'s standard for crossing device claim pre-emption after *Shanklin* in a FELA case), *cert. denied*, 531 U.S. 1112 (2001); *St. Louis Southwestern Ry.* v. *Malone Freight Lines, Inc.*, 39 F.3d 864, 867 (8th Cir. 1994) (finding pre-emption when "all the devices prescribed in the FHA-approved upgrade plan are installed and operating"; rejecting a claim that installation of larger flasher lenses qualified as the installation of a warning device as defined in the federal regulations); *Earwood* v. *Norfolk S. Ry.*, 845 F. Supp. 880, 886 (N.D. Ga. 1993) (rejecting the argument that the use of federal funds in prioritization, planning, and contracting prior to an engineering study or installation was sufficient for pre-emption); *Akin* v. *Missouri Pac. R.R.*, 977 P.2d 1040, 1052-53 (Okla. 1998) (rejecting the Tenth Circuit's holding that the commitment of federal resources is sufficient for pre-emption; stating that pre-emption does not occur until federally funded devices are operational).

Under these contradictory cases, pre-emption has been variably determined to occur at the moment when federal funds go to a preliminary engineering study, *Hatfield*, 64 F.3d at 562, or at the moment when the last of the mandatory warning devices is installed, *Malone*, 39 F.3d at 867. The tests have ranged from the expenditure of more than minimal federal funds, *Hatfield*, 64 F.3d at 562, to full compliance with all regulations, *Kapitan*, Pet. App. 9a-10a; see also *Michael* v. *Norfolk S. Ry.*, 74 F.3d 271, 273 (11th Cir. 1996) (stating that if a federally funded automatic gate arm's length did not comply with federal regulations, there would be no pre-emption on claims for negligent failure to warn of defective devices or negligent maintenance, construction, or design).

The Tenth Circuit's ruling concerning the trigger for pre-emption reflects the plain language of the regulations, which specifies when pre-emption occurs: the adequacy of warning devices is federally determined under the regulations when "[f]ederal-aid funds *participate in the installation* of the devices." 23 C.F.R. § 646.214(b)(3) (emphasis added). The regulations do *not* include plaintiff's test that the devices must be "installed and operating." "Installation" in the regulations at issue here has the meaning of "[t]he act of installing," rather than "[t]he state of being installed." See *American Heritage College Dictionary* 704 (3d ed. 1997). This understanding is bolstered by two common-sense bases for construing the regulation. First, federal funds do not "participate" in the state of installation. Rather, federal funds "participate" in the act of installing devices, in the sense that they pay for the engineering and construction work to install warning devices. Second, the term "installation" is used similarly in the progressive (rather than the perfective) sense elsewhere in the regulations on highway or railroad projects. See, *e.g.*, 23 C.F.R. § 646.216(d)(3)(i) (allowing lump-sum payment for "[i]nstallation or improvement of grade crossing warning devices"); *id.* § 645.205(c) ("manner of installation"). Plaintiff would prefer that the warning devices be "installed and operating" before federal law determines the adequacy of the crossing, but this is not what the regulations say. The regulations require that the project be in progress—not that it be complete—for pre-emption to occur. Courts have no reason to disregard the plain language of the regulations, which defines the moment of pre-emption.

There can be no doubt that, under the plain language of the regulations, in this case pre-emption occurred because the installation was underway. Federal funds "participate," within the meaning of 23 C.F.R. § 646.214(b)(3), in the State's cost of the project as a whole on a 90/10 basis, *id.* § 646.212(b)(3), as long as the device installation was within the course of the project and the costs were reimbursable

under the federal regulations. *Id.* § 140.904(a). All the warning devices were part of the federally approved project and reimbursable as such, and the installation of the passive devices was complete and the installation of the active devices was underway. Accordingly, federal funds were participating in the installation of the warning devices at the time of the accident. In summary, state-law claims based on the adequacy of the devices were pre-empted.

Only this approach to pre-emption accords with the logic of *Easterwood* and *Shanklin*, which explained that the key to pre-emption is the federalization of the crossing, not the particulars of the warning devices or their functioning. It simply makes no sense to hold, in a project governed by federal pre-emption law that sets the standard for the *selection* of warning devices, that pre-emption of state law regarding the *selection* of warning devices does not occur until after the devices are actually "installed and operating."

As the Tenth Circuit, interpreting this Court's *Easterwood* precedent, has explained, once the federal government is involved, the railroad can no longer make decisions on the adequacy of the warning measures. Therefore pre-emption logically occurs at the beginning, rather than the end, of a federally funded grade crossing improvement:

> The fundamental issue under both *Easterwood* and our post-*Easterwood* decisions is whether the federal government has "displace[d] state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained" and "effectively set the terms under which railroads are to participate in the improvement of crossings." *Easterwood*, 507 U.S. at 670 . . . . [T]he issue is not *what* warning system the federal government determines to be necessary, but whether the *final authority to decide* what warning system is needed has been taken out of the railroad's and the state's hands under 23 C.F.R. § 646.214(b)(3) & (4).

Armijo, 87 F.3d at 1192 (citation omitted) (alteration in original). To adopt an "installed and operating" rule would saddle railroads with liability for decisions that they can no longer make because of the federal regulations.

Despite the illogic of its "installed and operating" rule, the Indiana Court of Appeals did cite language to that effect in *Shanklin*:

> "[O]nce the FHWA has funded the crossing improvement *and the warning devices are actually installed and operating*, the regulation 'displace[s] state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained.'"

Pet. App. 9a (second alteration in original) (quoting *Shanklin*, 529 U.S. at 354 (quoting *Easterwood*, 507 U.S. at 670)). But *Shanklin* cannot be read to have reached out to resolve an issue and a circuit conflict that were not presented and were not briefed: namely, the application of FRSA pre-emption to mid-project collisions. The passive devices at issue in *Shanklin* had been fully "installed" and "operating" long prior to the accident. *Shanklin*, 529 U.S. at 354.

In these quoted words, the *Shanklin* Court was differentiating the *Easterwood* situation in which federal funds *never* participated in the installation of warning devices because the installation component of the project was cancelled and funds reallocated.[12] See *id.* at 353-54 (discussing *Easterwood*). Understandably, the Court did not favor pre-emption by federal regulations that did not apply because no federal funds were "participat[ing] in the

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[12] There had been motion-detection circuitry installed, but such circuitry did "not meet the definition of warning devices provided in 23 C.F.R. §§ 646.204(i) and (j) (1992)," *Easterwood*, 507 U.S. at 672, so federal funds did not participate in the installation of warning devices as required for pre-emption. The passive warning devices installed in the instant case qualify as warning devices under 23 C.F.R. § 646.204.

installation of the devices." 23 C.F.R. § 646.214(b)(3)(i). The Court's distinction of the *Easterwood* case should not be read as a new pre-emption standard that is in conflict with the plain language of the regulation and the logic of this Court's decision.[13]

The regulations involved here make clear that federal authority displaced the railroad's authority by the time of the accident in this case. Federal regulations determine the adequacy of warning devices when federal funds participate in the installation of the devices. See *id.* § 646.214(b)(3). In this case, federal funds participated in the installation of the pavement markings and the signs, which were part of the project that was 90 percent funded by the federal government and ten percent by the State. See *id.* § 646.212(b)(3). Thus, the safety rules of the federal regulations provide the determination of adequacy, and once they apply, as here, the railroad does not have the authority to supply different warning devices.

Independently of the pre-emption effected by section 646.214, a separate regulation establishes that the FHWA is the authority on the adequacy of interim protection devices: the FHWA must approve the State-railroad agreement for crossing improvements, which shall include the protective services required during the performance of project. Specifically, 23 C.F.R. § 646.216(e)(2) provides that before advertising for bids or proceeding with construction, "[t]he plans, specifications and estimates must be approved by FHWA," and a "proposed agreement between the State and railroad must be found satisfactory by FHWA." *Id.* § 646.216(e)(2)(i)-(ii). Significantly, the "pertinent portions of the State-railroad agreement applicable to *any protective*

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[13] *Shanklin*, in setting forth the circuit conflict it was resolving, cited the Tenth Circuit's *Armijo* decision, *Shanklin*, 529 U.S. at 351, and adopted the Tenth Circuit's approach to the issue of whether passive devices could trigger pre-emption; *Shanklin* thus left *Armijo* as good law.

services required during performance of the work must be included in the project specifications and special provisions for any construction contract." *Id.* § 646.216(e)(2)(iv) (emphasis added). Here, the federally funded stop signs were installed as an additional interim safety device for this purpose. See MUTCD § 8B-9 (1988) (providing for stop signs at crossings as "an interim measure until active traffic control signals can be installed").

These regulations demonstrate that there is federal authority over interim safety, and railroads do not have the power to compel the state or local government agency to supply signals on public roads, or to delay the opening of a road. See MUTCD § 1A-3.1 (1988) ("Traffic control devices shall be placed only by the authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic."). The rule that interim measures during a grade crossing improvement are subject to federal approval thus has an independent pre-emptive effect, superseding any duties the State may have imposed on the railroad regarding interim measures. These regulations "cover the subject matter" of safety during a federally funded project for the installation of active traffic control devices, thus pre-empting state-law claims under the FRSA. See *Easterwood*, 507 U.S. at 664-65, 671. In addition, the explicit federal authority over mid-project safety reinforces the understanding that the application of 23 C.F.R. § 646.214 had federalized the crossing at the beginning of installation.

Indeed, in this case, the trial court ruled that the railroad had neither the duty nor the authority to close the Hendricks Street crossing during the installation project (something only a governmental authority can do, since the crossing is part of the public roadway system). The railroad had moved for judgment on the evidence on the issue of whether it was under a duty to ensure the closure of the Hendricks Street crossing during the upgrade, stating that there was "no evidence indicating that the Grand Trunk had any control

over the opening or closing of the crossing." C.A. App. 1701. The trial court agreed: "The Court will grant the motion for judgment on the evidence on that issue, and . . . the Court finds that the Defendant railroad neither had the duty nor the power to close that road." *Id.* at 1702 (omission in original). This ruling remains uncontested. Grand Trunk did not have the ability to require different warning devices or closure of the crossing in this case once the project had been federalized.[14]

The issue in this case is not whether the crossing should have opened before the gates were working, or what warning devices were best, but when federal law begins to govern. The regulations specify that this moment is when federal funds participate in installing the warning devices, as the Tenth Circuit has recognized. The Indiana Court of Appeals and other federal circuits, on the other hand, have delayed the effect of pre-emption until the last of the warning devices is installed.

If the Indiana Court of Appeals decision is permitted to stand, it will unfairly subject a railroad to liability for decisions that the regulations have removed from its control. Moreover, the differences among the courts will continue to undermine the national uniformity in railway safety regulation expressly required by Congress. When Congress passed the FRSA, it was addressing the haphazard nature of railroad safety regulation in the States, and one of the main goals of the legislation was to promote "[n]ational uniformity" in the area of railroad safety. 49 U.S.C. § 20106. Congress prescribed standards for federal pre-emption, and the FHWA promulgated regulations covering safety in the situation here: a federally funded grade crossing. The coexistence of different standards for federally funded grade crossings defies the federal legislative intent and defeats the

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[14] Project timing is also within the control of the state and the FHWA, not the railroad. *See, e.g.*, 23 C.F.R. §§ 646.218(c)(3), 646.216(e)(2).

purpose of the regulatory system on grade crossing safety. This Court should grant certiorari to promote the statutory goal of uniformity in rail safety.

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Despite Congress's express policy decision that federal funding of warning devices and accompanying federal pre-emption of state law is the best means to effect railway safety, some courts continue to try to evade the FRSA's pre-emptive effect. This Court's immediate review is especially critical because the lower courts have erroneously regarded *Shanklin* as resolving a critical question of federal law that was never presented in that case. If the Court does not reverse summarily on the basis that federal funds installed passive devices, which requires reversal under *Shanklin*, this Court should grant certiorari to make clear that the railroad's state-law duty of care for warning devices ends when the process of installing federally approved and funded warning devices begins.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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